Before the
Federal Communication Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	
	)	

COMMENTS OF WILLIAM E. RANEY, ATTORNEY COPILEVITZ AND CANTER, LLC

I. INTRODUCTION

I am a partner at Copilevitz and Canter, LLC, and provide counsel to a group of small businesses which desire to use telephone messages to send "help-wanted" type information to residential telephones. This group has asked Copilevitz and Canter to relay its comments on the proposed changes to the TCPA to the Commission.

I submit these comments to inform the FCC of the value of this mode of communication to small businesses and to the individuals who respond to the help-wanted messages. I urge that the FCC adopt regulations which allow this type of message consistent with protecting small businesses and existing federal case law[1]. The adoption of rules which would explicitly exclude employment opportunities from the definitions of "property, goods or services" would ensure that the regulations are consistent with federal case law and aid consumers who desire to find work and small businesses find qualified workers.

I would also suggest that the FCC clarify its previous statements regarding the applicability of the TCPA, exclusively, to interstate telephone calls. This clarification would be consistent with the legislative history of the TCPA, the regulatory scheme behind the Telecommunications Act and prior FCC opinion letters issued on this subject.

II. COMMENTS

A. Modification of Definition of Unsolicited Advertisement to Exclude Help Wanted Information

It is without dispute that finding and hiring qualified associates is key to survival of any businesses. It is also without dispute that it is in the best interests of potential employees and associates. My client has found that using the telephone to provide

1 Lutz Appellate Services, Inc. v. Rodney Curry et al. ,859 F. Supp. 180 (E.D. Pa. 1994).

information regarding these opportunities is the most cost effective way to deliver this information.

My client conducted an informal survey of businesses with regard to this issue and I am providing this information to you in support of this comment.

114 small business people are represented in the survey. These are people who all use telephone messages to contact potential associates. These people do not attempt to advertise, sell or describe a product or service using a telephone message. They use telephone messages as a means of finding people that would like to receive free information sent to them about the type of employment opportunity or business that they conduct. The following is how they responded to the survey questions:

Question 1: What percentage of your businesses' associates were first contacted using telephone messages?
Highest Response: 50+%
Lowest Response: 25%
Average of all responses: 39%

Question 2: From the free employment information that is mailed to those who request it, what monthly sales figure has ultimately been generated by these associates?

Highest Response: $80,000 per month
Lowest Response: $8000 per month
Average of all responses: $39,750 per month
Total Monthly Sales Volume: $318,000 per month

The next 2 questions asked how a total ban on this type of message would affect their businesses. The typical response was "dramatically." or "This would put us out of business." One person stated that the "alternative methods of finding associates would be 12 times more expensive."

Many people stated that they purchased these machines on a lease and would have to continue paying for them even though they could not use them.

The people that responded to this survey are all small business people. Every day for these people is a fight just to survive in the marketplace. Many of these people have started their own businesses because they lost their jobs due to downsizing. These small start-up businesses have an extremely difficult time acquiring capital to start and operate their businesses. Using these messages has given them a very rare, cost effective tool. Placing a complete ban on the use of these messages would have a devastating effect on their businesses.

The Lutz opinion unequivocally states that "A company's advertisement of available job opportunities within its ranks is not the advertisement of the commercial availability of property." The Court found that the plain meaning of the words of the TCPA require this conclusion. Id. at 182.

The current regulations define "unsolicited advertisement" as: "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 CFR §64.1200(f)(5).

I suggest modifying this definition to eliminate its circular nature (i.e. defining "advertisement" using the word "advertising") and to clarify that employment opportunities are not unsolicited advertisements. This would allow consumers to receive valuable information which is not a solicitation and businesses to operate without legal uncertainty.

I suggest adopting the following language to affect these goals:

(f)(5) The term unsolicited advertisement means any material specifically including the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission. This term does not include information available at no cost to the recipient concerning employment opportunities which do not involve solicitation as that term is defined at 47 U.S.C. §227(a)(3).

This modification would protect my clients from legal uncertainty and allow consumers to receive information unrelated to the sale of goods or services.

B. Congress and the FCC have previously stated the TCPA preempts state law with regard to interstate telephone calls.

I also assert that it is in the best interests of businesses and consumers to have a uniform national regulation regulating its telephone contacts. Small businesses often do not have the resources to determine and comply with laws which are often inconsistent with the TCPA- i.e. an interstate telephone call allowed by the TCPA should not be restricted by an inconsistent state law.

In the past the FCC has specifically stated that state law can not apply to interstate telephone calls. This is a reasonable interpretation of the preemption language found in the TCPA and is consistent with the statements found on this topic in the legislative history. I urge the FCC to maintain a consistent stance on this issue by explicitly stating that the TCPA and its regulations preempt state law on the same topic as applied to interstate telephone calls.

The legislative history to the T.C.P.A. reinforces the opinion that states do not have jurisdiction over interstate calls. "Over forty states have enacted legislation limiting the use of [recordings]. These measures have had limited affect, however because states do not have jurisdiction over interstate calls." Legislative History, Senate Report No.102-178, p. 3. Further, Senate Report 102-177 repeats the claim under "the need for legislation" that:

> As a result, over 40 States have enacted legislation limiting the use of automatic dialers or otherwise restricting unsolicited telemarketing. These measures have had limited effect however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telephone calls to supplement their restrictions on intrastate calls.

102 Senate Report 177(page 3) (emphasis added). Next, the comments of Senator Hollings concerning the law are set forth in the Congressional Record at 137 Cong. Rec. S. 18781 as:

> Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject to § 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.

Id. at page 10 (emphasis added).

Also in the Congressional Record, Senator Hollings stated that:

> Mr. Steve Hamm, administrative of the Department of Consumer Affairs of South Carolina, informed me that his office receives more complaints about computerized telephone calls at 900 numbers than any other problems. Despite the fact that South Carolina recently passed legislation to protect consumers from unwanted computerized calls within our State, South Carolina consumers continue to suffer from computerized calls made from out-of-State. The State law does not, and cannot, regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries. That is why Federal legislation is essential.

137 Cong. Rec. S. 16204 at page 4 (emphasis added).

Three federal appellate cases have repeated this language to the effect that states have no jurisdiction over interstate calls due to preemption by the T.C.P.A.. International Science Technology Institute, Inc., v. Inacom Communications, Inc., 106 F.3d 1146, 1154 (4th Cir. 1997); Chair King, Inc., v. Houston's Cellular Corp., et al. 131 F.3d 507, 513 (5th Cir. 1997). Moser v. FCC, 46 F.3d 970, 972 (9th Cir. 1995). But see Van Bergen v. State of Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995) (state law application to intrastate calls using recordings is not preempted.)

The FCC should specifically state that its rules concerning predictive dialers, caller ID, and delivery of unsolicited advertisements by recording or facsimile is preempted with regard to interstate calls.

Furthermore, the FCC has responded to consumer inquiries concerning preemption and stated unequivocally that it is the FCC's position that the T.C.P.A. preempts state regulation of interstate calls with regard to recorded messages. Specifically, a March 3, 1998 letter from Geraldine A. Matise Chief, Network Services Division, to Mr. Sanford L. Schenberg states that: "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The T.C.P.A. and Commission Regulations, enacted pursuant to the T.C.P.A., govern interstate commercial telemarketing calls in the United States." Similarly, a January 26, 1998 letter from Ms. Matise to Delegate Ronald A. Guns of the Maryland House of Delegates specifically addressed the delivery of recordings by telephone and states that: "In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state."

The definition of "interstate communication" is clearly defined in the Telecommunications Act of 1934 as "any communication from any state to any state." 47 USCS § 153(22).

Consistent with these opinions, the FCC should specifically state that the TCPA and its regulations are the sole laws applicable to these topics with regard to interstate telephone calls.

III. CONCLUSION

I would welcome the opportunity to provide any additional information the FCC requests regarding this comment. It is my belief that our suggestions for the rules concerning the definition of "unsolicited advertisement" would help consumers and business by allowing people to find employment and small business to find workers in a cost-effective manner.

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